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Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A Corporation,
Petitioner,

vs.

SANDRA WETZEL and MARI ROSS,
on behalf of Themselves
and all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit

BRIEF AMICI CURIAE OF CENTER FOR CONSTITUTIONAL RIGHTS, EMPLOYMENT LAW CENTER, EQUAL RIGHTS ADVOCATES, INC., NATIONAL ORGANIZATION FOR WOMEN, UNION WAGE, WOMEN'S LEGAL DEFENSE FUND, WOMEN ORGANIZED FOR EMPLOYMENT ON BEHALF OF RESPONDENTS

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BRIEF AMICI CURIAE OF CENTER FOR CONSTITUTIONAL RIGHTS, EMPLOYMENT LAW CENTER, EQUAL RIGHTS ADVOCATES, INC., NATIONAL ORGANIZATION FOR WOMEN, UNION WAGE, WOMEN'S LEGAL DEFENSE FUND, WOMEN ORGANIZED FOR EMPLOYMENT ON BEHALF OF RESPONDENTS

INTEREST OF AMICI CURIAE*

The Center for Constitutional Rights is a non-profit, tax-exempt legal and educational corporation con-

*This brief is filed with the consent of the parties. The letters of consent have been filed with the Clerk of the Court.

cerned with advancing and protecting the rights and liberties guaranteed by the Bill of Rights to the United States Constitution. The Center has been in the forefront of litigation to assure the liberty and equality of women under the law, particularly freedom of choice to procreate under the due process clause of the Constitution.

The Employment Law Center, a project of the Legal Aid Society of San Francisco, provides free legal assistance to poor residents of San Francisco in a concentrated effort to secure and enhance their rights to equal employment opportunity. The Center represents large numbers of poor working women who are acutely affected by disability programs which —like Liberty Mutual's program—do not provide compensation for pregnancy-related disabilities.

Equal Rights Advocates, Inc. is a non-profit, tax-exempt legal and educational corporation dedicated to promoting the equal rights under the law of women and men. Lawyers for ERA, Inc. devote substantial amounts of time and energy to advancing the employment rights of women through negotiation, public education and litigation, and have participated as counsel and amicus curiae in a number of cases involving discrimination against pregnant women, including *Geduldig v. Aiello,* 417 U.S. 484 (1974).

The National Organization for Women (NOW) is a national membership organization of women and men organized to bring women into full and equal participation in every aspect of American society. Its membership consists of large numbers of working

women who are directly affected by disability programs similar to that of defendant Liberty Mutual.

The Union Women's Alliance to Gain Equality (Union WAGE) is a national membership organization of working women, including women on welfare and unemployed women, organized to gain equal rights, equal pay and equal opportunity for women in their unions and from their employers. Union WAGE's membership includes substantial numbers of working women who are directly affected by disability programs similar to that of defendant Liberty Mutual.

The Women's Legal Defense Fund is a non-profit, tax-exempt organization founded in 1971 whose objective is to provide legal representation and counselling to persons who are challenging sexually discriminatory laws and practices. To achieve this end, the fund has brought test litigation, presented its views as amicus curiae, provided legal counselling on domestic relations and employment discrimination issues, filed comments before administrative agencies at both the federal and local levels, and conducted information seminars as a public service to the community.

Women Organized for Employment (WOE) is a non-profit organization in the San Francisco Bay Area committed to the achievement of equal employment opportunity for women. Through job counselling and educational programs for women job-seekers and for employers, WOE seeks to eradicate any employment practice that discriminates on the basis of sex, including discrimination against pregnant women.

These organizations participate in this case as *amici* because each of them, through their members, participants or clients, have substantial experience with the operation and adverse effects of employer pregnancy rules upon working women. Because of this experience, each has concluded that the achievement of even-handed treatment of pregnant women and women suffering from pregancy-related disabilities is essential to the achievement of full equality for working women.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is the goal of this brief not to repeat the legal arguments of the respondents but rather to lay the factual foundation for what respondents contend is the proper legal resolution of this case. *Amici* herein explore the historical causes and the present effects of employer pregnancy policies upon working women, the large majority of whom become pregnant at some time in their working lives.

Employer pregnancy rules are an integral part of a complex of employer practices which are based upon the assumption that women who work are marginally attached to the labor force, that they should and will place home and family above job, and that, in the normal course of events, they will marry, become pregnant and leave the workforce. Based on these assumptions, employers historically refused to hire married women at all, or fired them when they became pregnant. Later, in the 1940's and 1950's, under pressure from the government and organized labor,

these harsh measures began to yield as many employers substituted mandatory maternity leaves for outright dismissal. (Section I-A.)

Today, a broad range of employer pregnancy policies undermine the job security and continuity of working women, affecting their seniority, promotional opportunities, wages and fringe benefits in ways that can be carried forward over their entire work lives. If such consequences were ever justified by the work-life pattern of women, they are no longer. The proportion of working women, particularly mothers of young children, has increased dramatically in recent decades, and it is now apparent that women are in the work force to stay. (Section I-B.)

Moreover, employer pregnancy rules penalize the choice to bear a child by conditioning that choice upon the short and long term sacrifice of employment security and opportunity and the concomitant suffering of economic hardships against which all other temporarily disabled workers are protected. (Section I-C.)

The modern justification for placing pregnant women on unpaid leaves of absence rather than treating pregnancy- and childbirth-related disabilities like other disabilities is that the cost of covering such disabilities is excessive. The employers who have submitted briefs in this case buttress that argument by asserting that women already receive a disproportionate share of benefits under income protection plans. Such contentions omit the reality that temporary disability insurance is but one of several income protection plans used by employers to compensate disa-

bility days, under some of which men typically cost an employer more than women do. They also confound cause with effect because low income workers, not women, have a higher incidence of disability. The disproportionate concentration of women in low paying jobs is the major cause of women's apparently higher incidence of disability. An analysis of the pay and position of women in comparison to men in Liberty Mutual's and American Telephone and Telegraph Company's workforces strikingly demonstrates why their women employees account for more of their paid disability days than men do. (Section II-A.)

Moreover, Liberty Mutual's estimates of the additional cost of covering childbirth disabilities is grossly exaggerated, and, in any event, was not the basis for its choice to exclude pregnancy and childbirth disabilities from its income protection plan. (Section II-B.)

Congress, in passing Title VII, broadly intended the act to strike the whole spectrum of employer practices which deprive women and minorities of equal employment opportunity. Title VII therefore prohibits classification of employees "*in any way* which would deprive *or tend to deprive* any individual of employment opportunities *or otherwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. §2000e-2(a)(2). Because employer pregnancy rules stem from outmoded stereotypes about women and deeply affect their employment status and opportunities, they are firmly within the scope of coverage of Title VII. That Congress so

intended is evident not only from the intent and scope of the Act itself but also from Congressional and governmental treatment of pregnancy- and childbirth-related disabilities under other federal legislation. The most recent demonstration of this intent is Congress' approval of regulations issued pursuant to an act prohibiting sex discrimination by educational institutions which are virtually identical to the Equal Employment Opportunity Commission's pregnancy guidelines. (Section III.)

ARGUMENT

I. THE EMPLOYER POLICIES OF EXCLUDING PREGNANCY AND CHILDBIRTH DISABILITIES FROM INCOME PROTECTION PLANS ARE VESTIGES OF OUTMODED ATTITUDES TOWARD, AND ADVERSELY AFFECT THE EMPLOYMENT OPPORTUNITIES OF, WORKING WOMEN.

At the core of the sex stereotypes resulting in the disparate treatment of men and women is the assumption that women will marry, become pregnant and leave the labor market. Based upon this prediction, employers assume low career aspirations in women and are reluctant to provide education and training to their women workers, to hire them into high level jobs, or to place them in jobs apt to lead to promotion. On the assumption that women will place family first, employers expect high turnover from women and therefore place them in low skill, low status jobs for which such "traits" are expected. Pay in these "women's jobs" reflects the general assessment of the woman worker as a marginal worker,

with no serious commitment to career, and assumes her natural complement, a breadwinner husband. See, generally, U.S. Dep'ts. of Labor and Health, Education, and Welfare, *Manpower Report to the President* (1975), p. 69; V. Oppenheimer, *The Female Labor Force in the United States* (1970), pp. 104-5, 109-14; *Report of the Twentieth Century Fund Task Force on Women and Employment: Exploitation from 9 to 5* (1975), p. 66.

Employer pregnancy rules are an integral part of the complex of employer practices resulting from the assumption that women will marry, become pregnant and leave the workforce. Perhaps inevitably, they are the most deeply illustrative of the operation of the stereotype, because the pregnancy of a worker is viewed by employers as the confirmation that she is participating in the expected pattern.[1]

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[1]A sophisticated rendition of this view is the assertion in this case by employers such as Liberty Mutual and American Telephone and Telegraph Company that the payment of disability benefits to women disabled by childbirth would constitute a "unique form of severance pay," despite the fact that a substantial and growing number of women return to work after childbirth. While return rates differ among companies and are no doubt affected by the kind of leave provided, the return rate of women employees who take a leave for childbirth is generally high. A Prentice-Hall survey revealed that most women who take a leave return to work:

> We asked survey respondents to tell us what proportion of their employees who were pregnant in 1971 quit their jobs and what proportion took a leave. . . . [H]alf the plants, one-third of the office firms . . . said that 75% or more of the employees who are pregnant elected to take a leave. (In many cases, 100% of the employees took a leave). . . . More than half reported a perfect score on "returns"—that is, all the employees who elected [to take] a leave actually returned to work as scheduled.

Prentice-Hall Survey of Maternity Leave Policies, Report Bulletin 25, Vol. XIX (June 6, 1972), p. 463.

Employers' pregnancy policies have been tailored to reflect and even hasten these role expectations. The origins and history of these policies demonstrate that employers originally expressed such assumptions by refusing to hire married women at all; they later modified this practice by permitting married women to work but fired them when they became pregnant. Finally, under pressure from the Labor Department and organized labor, they began to substitute mandatory leaves of absence for outright dismissal. From early times to the present, the benefits extended to other disabled workers to promote productivity and loyalty and to reduce absenteeism and turnover, such as job security, retention or accumulation of seniority, and wage replacement through sick leave or disability programs, have been denied to workers disabled by pregnancy and childbirth.

A. Employer Pregnancy Policies Are The Vestiges Of Outmoded Attitudes Toward Working Women.

The evolution of employer practices concerning pregnant workers demonstrates that assumptions about women's proper role—that of childbearing and rearing—are the reasons for most employer pregnancy practices, rather than modern day "neutral" cost rationales.

From early times in this country, the concept of the natural "sphere" or role of woman as wife, mother and homemaker has shaped and dictated her acceptance and treatment in the labor market. Justice Bradley of this Court spoke not only for the concurring

justices but for the society of his time when he proclaimed, in 1873, that :

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman . . . . The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institutions is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141, 21 L.Ed. 442 (1873) (concurring opinion of Bradley, J.).

While single and immigrant women were tolerated in the working world, wives of American workers were not:

> The American family standard has always been a bread-winning father, and a mother occupying herself with the care of her children. Any deviation from this custom is cause for comment. Pride on the part of our native workmen serves to keep their wives out of the ranks of wage earners.

A. MacLean, *Women Workers and Society* (1916), p. 39.

Even Samuel Gompers, the father of the American Federation of Labor and a supporter of the women's suffrage movement and equal pay for equal work, believed that the place of the married woman was in the home.

> I contend that the wife or mother, attending to the duties of the home, makes the greatest contribution to the support of the family. The honor, glory, and happiness that comes from a beloved wife and the holiness of motherhood are a contribution to the support and future welfare of the family that our common humanity does not yet fully appreciate. . . .

F. Thorne, *Samuel Gompers: American Statesman* (1957), p. 89 (quoting from *American Federationist,* January, 1906). When asked in 1905 by the *Woman's Home Companion* if the wife should contribute to her family by working for wages, he replied, "Positively and absolutely, 'No'." B. Mandel, *Samuel Gompers* (1963), p. 233.

The view that women belonged at home, rather than in the workforce, persisted into the 1920's. In an expression of the prevailing view, women participating in the American Institute of Banking convention in 1923 were told that they were "merely temporary employees" in the nation's banks and businesses and that their goal should be to return home. W. Chafe, *The American Woman* (1972), p. 64.

The 1920's also saw the beginning of what has since been called "the fringe benefit movement" among employers. D. Allen, *Fringe Benefits: Wages or Social Obligation?* (Rev. ed. 1969), pp. 23, 230. From its inception, there was evidence that in fringe benefits, as well as other terms and conditions of employment, the employers' view of women as marginal workers whose proper and expected role was wife and mother would limit the benefits made available to them.

Women were excluded altogether from some such fringe benefit programs. When, for example, the General Electric Company's sickness and accident insurance plan was altered from an employer-supported to contributory plan, women employees were not invited to participate. Gerard Swope, the president of General Electric, explained the exclusion by saying, "Frankly, our theory had been that women did not recognize the responsibilities of life, for they probably were hoping to get married soon and leave the company." D. Loth, *Swope of GE: Story of Gerard Swope and General Electric in American Business* (1958), p. 155; G. Swope, "Management Cooperation with Workers for Economic Welfare," *The Annals of the American Academy of Political and Social Science,* Vol. 154, pp. 131, 132 (March 1931).

The Depression of the 1930's intensified negative attitudes toward working married women. The practice of refusing to hire married women increased. A National Education Association study in 1930-31 showed that, of 1500 school systems surveyed, 77 percent refused to hire wives and 63 percent dismissed women teachers if they subsequently married. Whole cities campaigned for the firing of working wives, and most state legislatures considered bills to restrict the employment of married women. W. Chafe, *The American Woman* (1972), pp. 100, 108-109; L. Pruette, *Women Workers Through the Depression* (1934), pp. 104-105.

During World War II, the manpower shortage resulted in an unprecedented influx of women into the

labor force, and forced a reassessment of policies and practices affecting working women. The Government, through the Department of Labor, played an active role in seeking to make the working world more hospitable to women, including wives and mothers.[2] A primary concern of the Department of Labor was the prevailing employer practice of terminating women workers upon discovery of pregnancy. See, e.g., C. Silverman, "Maternity Policies in Industry," 8 *The Child* 20, 21 (Aug. 1943); J. Mohr, "The Industrial Nurse and the Woman Worker," (Women's Bureau Spec. Bull. No. 19, 1944), p. 29; "Touchy Problem," *Business Week* (Sept. 25, 1943), p. 80; International Labour Office, *The War and Women's Employment* (Montreal, 1946), pp. 230-233.

In December of 1942 and January of 1943, the Children's Bureau did an extensive national study of the working conditions of women. Among other things, the study investigated employer reasons for the termination of women as soon as they were known to be pregnant. Dr. Charlotte Silverman of the Research Division of the Children's Bureau reported that when employers were first asked why they fired women, many responded that they did it to protect the woman's health or because of the diminished efficiency of an employee who is pregnant. Pressed further, they

[2]The War Manpower Commission issued a statement of policy on recruitment, training and employing of women workers which recommended, *inter alia,* equal treatment of women workers in hiring, training and wages. See "Policy of War Manpower Commission on Women Workers," *Monthly Labor Review,* Vol. 56, No. 4 (1943), pp. 669-671; "Standards for Women's Employment in Wartime," *Monthly Labor Review,* Vol. 56, No. 6 (1943), p. 1120.

expressed a fear that pregnant women might miscarry, and blame her occupation. Both reasons were pretexts. Of all the employers surveyed only one reported an incidence of miscarriage, and "[a]ll the medical directors that were interviewed agreed that it is in the first three months of pregnancy that the danger of miscarriage is greatest and that practically all the pregnant women remained at work during this period, as it is unusual for pregnancy to be reported so early." C. Silverman, "Maternity Policies in Industry," *supra,* pp. 21-22.

Dr. Silverman further reported that many employers gave "esthetic and moral" reasons for terminating pregnant women:

> In many plants it was stated that it was "not nice" for obviously pregnant women to be working in a factory and that such employment had a bad effect on the male employees, who made it a subject of frequent comment and were distracted from their work.

Id. at p. 22.

To combat early dismissal of pregnant women, the Women's Bureau engaged in a campaign to educate employers about the economic needs of working women and the employer's economic interests in retaining trained and able-bodied workers beyond the early months of pregnancy. In addition, in July of 1942 it issued in conjunction with the Children's Bureau a statement of Standards for maternity care and employment of mothers in industry. In the Standards, the Women's Bureau recommended that pregnancy

not be grounds for dismissal. As an alternative, the Bureau recommended a "protective" leave period of not less than six weeks before delivery and two months after delivery, the latter limit to be extended upon a physician's recommendation. An important aspect of the Bureau's Standards was its recommendation that a woman be permitted to return to her former job, or if it were unavailable, another job of equivalent value, at the current wage paid for the job. Accumulation of seniority for 3½ months of the leave and retention of seniority thereafter and the use of sick leave and vacation pay were also recommended.[3] See, U.S. Women's Bureau, *Union Provisions for Maternity Leave for Women Members,* Union Series No. 3 (1945); C. Silverman, "Maternity Policies in Industry," ***supra,*** pp. 23, 24.

Despite its efforts and the support of organized labor, the Women's Bureau made little headway to-

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[3]The laws of six states which required "protective" maternity leaves prior to and after childbirth during the War continued in force through the time Title VII was passed. See, U.S. Women's Bureau, "State Labor Laws for Women with Wartime Modifications", Bulletin, No. 202-III, (1945), pp. 11-12, Chart III; President's Commission on the Status of Women, ***Report of the Committee on Protective Labor Legislation*** (1963), p. 15. None of these laws required reemployment, retention of seniority rights or paid leaves.

Both the Philippine Islands and Puerto Rico had leave laws requiring maternity leaves for one month before and one month after childbirth. Unlike the six states with such provision, however, the two protectorates accompanied their leave requirements with a prohibition against firing pregnant women and a requirement that they be paid during their maternity leave.

Unemployment insurance laws of many states exacerbated the effect of employer terminations of pregnant women by restricting the availability of unemployment benefits both before and after childbirth. See, U.S. Dep'ts. of Labor and Health, Education and Welfare, ***Manpower Report of the President,*** (1975), pp. 72-73.

ward the acceptance of its Standards by the War's end. "Women Will Stay," *Business Week* (May 12, 1945), pp. 102-103. *Business Week* reported:

> A survey of 92 midwestern . . . war plants recently revealed that only five recognize maternity as a basis for leave, although in a number of others a contract provision covering illness sometimes is broadly construed as including pregnancy. In many plants, however, pregnancy is a basis for layoffs with resulting loss of seniority, vacation, and other length of employment rights.

Id. at 103.

And, as the men returned from war, attitudes toward women workers reverted almost overnight to those prevailing before the war. Despite indications that most of the women who entered the labor force during the national manpower shortage wished to continue working (see International Labour Office, *The War and Women's Employment, supra,* pp. 264-267; "Women War Workers' Post-War Job Plans," *Monthly Labor Review,* Vol. 59, No. 3 (1944), pp. 589-590), women were laid off in enormous numbers.[4] Some companies laid off, without regard to seniority, all wives with working husbands. See "Workers' Wives Go First," *Business Week* (Jan. 29, 1944), p. 103; "Employers' Postwar Plans for Women Workers," *Monthly Labor Review,* Vol. 60, No. 6, (1945) p. 1269. The lesson of World War II was clear, indeed: women were still the marginal workers,

[4]See, e.g., "Effects of Cutbacks on Women's Employment", *Monthly Labor Review,* Vol. 59, No. 3 (1944), p. 585; "Women's Tendency to Leave the Labor Market", *Monthly Labor Review,* Vol. 59, No. 5 (1944), p. 1029.

who, in time of national need, would be called upon to carry on the nation's work, but when the emergency was over, were sent home where they belonged. W. Chafe, *The American Woman, supra,* pp. 177-180.

Nonetheless, the wartime experience permanently changed the work aspirations and patterns of women. Many of those who were laid off from the higher paid war industries found work in traditional "women's" jobs[5] and their numbers steadily increased in the decades that followed.[6] See, generally, W. Chafe, *The American Woman, supra,* Chapter 8.

The management "fringe benefit movement" which began in the 1920's expanded dramatically after the War. The original motivation of employers in providing fringes in the 20's remained their primary motivation in the 50's and 60's— to increase productivity.

> "Company executives say their main reason for providing group insurance is to give their employees a sense of security. They feel that such freedom from worry will result in higher employee morale, better worker-management relations and increased productivity," wrote one management publication. Benefits "help to stabilize work forces," said a company official in *Factory* magazine. "They create job satisfaction and inspire employees to greater productivity."
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> . . .
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> *Business Management* reported that 84 percent of employers responded affirmatively in a survey

[5]M. Pidgeon, "Women Workers and Recent Economic Change," *Monthly Labor Review,* Vol. 65, No. 6 (1947), pp. 668-669.

[6]The labor force participation rates of women rose from 33.9% in 1950 to 44.7% in 1973. *Manpower Report of the President* (1975), *supra,* p. 57.

> on the effects of fringe benefits on loyalty and stability of the work force. Selected samples from the files of the National Industrial Conference Board showed that "as a rule, employers regard what they spend on their benefit programs as an investment . . . to attract and hold good employees and motivate them to greater effectiveness."

D. Allen, *Fringe Benefits: Wages or Social Obligation?, supra,* pp. 243, 244.

Consistent with the management desire to increase productivity through fringe benefits was its efforts to control the fringe benefit money to maximize that aim. This was done through careful control and limitation on eligibility for fringe benefits so that they would be allocated to employees who employers thought would yield the highest productivity return. *Id.* at 244, 246. Women workers, particularly those who became pregnant, inevitably fell victim once again to assumptions concerning their work-force commitment and received the short end of the fringe benefit stick. In the spirit of Gerard Swope of General Electric, women's coverage under fringe benefit programs was less than men's. Under health and income protection plans,[7] women employees sometimes received lower weekly benefits than men, some programs

[7]The record before this court provides one such example. A group life insurance program instituted by Liberty Mutual in 1953 and in effect until 1967 contained three schedules, a basic schedule, a men's technical schedule, and a senior schedule. Under the basic schedule, paid for by the company, each employee received $3,000 worth of life insurance after three months of service. After ten years and three months service, employees were eligible to subscribe to the senior schedule for $25,000 worth of insurance. In addition, men in technical jobs could subscribe to the technical men's schedule, under which they received an additional $2,000 in coverage each year until the tenth year of employment. Women employees were excluded from this special additional life insurance coverage. App., p. 37.

limited the coverage of disabilities of female "generative organs,"[8] and those health and disability plans that did cover pregnancy-related medical expenses and disabilities most often provided coverage more limited than for other illnesses and disabilities.[9]

By 1964, the effective date of Title VII, more than forty percent of companies surveyed by the National Industrial Conference Board still did not even provide unpaid maternity leaves of absence for women. Among those which did, more than half placed women on leave before the seventh month of pregnancy. Only six percent of the companies with a paid sick leave program included pregnancy and childbirth disability in the program. National Industrial Conference Board, *Conference Board Report* (1964), pp. 121-122.[10]

[8]See "Health Benefit Programs Established Through Collective Bargaining", *Monthly Labor Review,* Vol. 61, No. 2 (1945), pp. 199, 203, 208.

[9]Typical clauses provided disability benefits for 13 to 52 weeks for all disabilities except pregnancy or childbirth related disability, which was covered for a maximum of six weeks. Hospitalization was often covered for 31 days but limited to 12 or 14 days for conditions resulting from pregnancy and childbirth. See, "Health-Benefit Programs Established Through Collective Bargaining", *Monthly Labor Review, supra,* pp. 193-194, 199.

[10]The federal government has long practiced what it preached to private industry during the war. Under a regulation of the Civil Service Commission, women can use their accrued sick leave for pregnancy and childbirth disabilities. And in 1946, Congress amended the Railroad Unemployment Insurance Act to include sickness benefits. "Maternity" benefits were explicitly covered in the sickness benefit amendment. See, U.S. Women's Bureau, "Maternity Benefit Provisions for Employed Women", Bulletin No. 272 (1960), pp. 22, 27. A. Bixby, "Statistics and Estimates for the United States Railroad Sickness Benefit Programme", *Bulletin of the International Social Security Association* (June, 1958).

In the period between 1969 and 1973, a period characterized by increased awareness of the adverse effects of pregnancy policies on working women on the part of government agencies,[11] legal scholars,[12] and the courts,[13] there was a marked improvement in employer practices. R. Quinn, *et al.*, "Evaluating Working Conditions in America," *Monthly Labor Review,* Vol. 96, No. 5 (1973), pp. 32, 37. In 1973, seventy-three percent of the women workers surveyed by Quinn reported that they were entitled to maternity leave with full reemployment rights as compared to 59 percent in 1969. Twenty-six percent reported the availability of maternity leave with pay as com-

[11]See, 29 C.F.R. § 1604.10. See also, Department of Health, Education and Welfare, Higher Education Guidelines, 37 Fed. Reg. 24686 (1972).

[12]See, E.D. Koontz, "Childbirth and Child Rearing Leave: Job Related Benefits", 17 N.Y.L.F. 480 (1971); Comment, "Love's Labors Lost: New Conceptions of Maternity Leaves", 7 Harv. Civ. Rts. & Civ. Libs. L. Rev. 260 (1972).

[13]See, *LaFleur v. Cleveland Board of Education,* 465 F.2d 1184 (6th Cir. 1972) (school board maternity leave rule violates equal protection); *Gilbert v. General Electric Company,* 375 F.Supp. 367 (E.D. Va. 1973) (employer's sickness and accident benefit policy with no provision for pregnancy disability sexually discriminatory and violative of Civil Rights Act); *Buckley v. Coyle Public School Systems,* 476 F.2d 92 (10th Cir. 1973) (claim regarding validity of school system maternity leave policy presented constitutional issues of sufficient substance to hear case on merits); *Green v. Waterford Board of Education,* 473 F.2d 629 (2d Cir. 1973) (school board maternity leave rule violative of Civil Rights Act); *Seaman v. Spring Lake Park Independent School District,* 363 F.Supp. 944 (D. Minn. 1973) (preliminary injunction granted against school district which attempted to force teacher to take leave of absence; teacher's ability to teach was not impaired); *Heath v. Westerville Board of Education,* 345 F.Supp. 501 (S.D. Ohio 1972) (school board maternity leave rule violative of equal protection because pregnancy treated differently from other medical disabilities.

pared to fourteen percent in 1969. *Id.* at 37, Table 4. See also, U.S. Dept's of Labor and Health, Education and Welfare, *Manpower Report to the President* (1975), p. 72; National Industrial Conference Board, *Profile of Employee Benefits,* Conference Board Report No. 645 (1974), p. 42.

Yet today, despite substantial improvements, many women are still fired for becoming pregnant, forced into maternity leaves before such leaves are medically necessary and prevented from returning to work when physically able.[14] And, alone among working women in industrialized countries of the world, women in this country are far more often than not

[14]*For terminations,* see, *e.g. Bradley v. Cothern,* 384 F.Supp. 1216 (E.D. Tex. 1974) (teacher fired for noncompliance with mandatory resignation requirement); *Crawford v. Cushman,* 378 F.Supp. 717 (D. Vt. 1974) (separation from service of pregnant women under Marine Corps regulations); *Godwin v. Patterson,* 363 F.Supp. 238 (M.D. Ala. 1973) (denial of maternity leaves to junior college teachers, forcing resignation); *Flores v. Secretary of Defense,* 355 F.Supp. 93 (N.D. Fla. 1973) (Naval discharge of unwed pregnant seaman); *Black v. School Committee of Malden,* 310 N.E. 2d 330 (S. Ct. Mass. 1974) (mandatory resignation at fourth month of pregnancy, ineligible for reinstatement until six months after childbirth); *School District No. 1 v. Nilsen,* 523 P.2d 1041 (C.A. Ore. 1974) (forced resignation of nontenured pregnant teachers); *Cerra v. East Stroudsburg Area School District,* 450 Pa. 207, 299 A.2d 277 (S. Ct. Pa. 1973) (forced resignation no later than end of the 5th month of pregnancy).

For mandatory leaves, see, *e.g., Paxman v. Wilkerson,* 390 F.Supp. 442 (E.D. Va. 1975) (termination of teachers with less than one year's service; teachers with more than one year's service receive mandatory leave at 5 months; teachers who learn of pregnancy before start of school year must request to be released from contracts); *Kornblum v. Newark Unified School District,* 37 Cal.App.3d 623, 112 Cal.Rptr. 457 (1974) (mandatory leave three months prior to delivery, no return before 3 months after childbirth or the following academic year, which ever comes first).

without income protection during the time they are unable to work because of childbirth.[15]

B. Employer Pregnancy Policies Undermine The Job Security And Opportunity Of All Working Women.

Women in the workforce, the significant majority of whom become pregnant at some point in their working lives,[16] are deeply affected by a wide range of employer practices relating to pregnancy. All of these practices are interpreted as violations of Title VII by the EEOC in its guidelines. Virtually all of them will be legal if petitioners prevail.

Termination of pregnant women is the most dramatic of these practices. Although termination is no longer the most common response to pregnancy, it is by no means unusual, as recent cases demonstrate. See, generally, cases cited in footnote 14, *supra*. Sometimes terminated women must seek work elsewhere after childbirth or reapply to their previous

[15]U.S. Dept. of Health, Education and Welfare, "Social Security Programs Throughout the World", Research Report No. 40 (1971), pp. xviii-xxiii. All countries in both Western and Eastern Europe have statutory programs of sickness and maternity benefits, as do all but five of the Western Hemisphere countries. In this country employers, partly in an effort to stave off such social legislation, created their own extensive fringe benefits programs. By the 1960's, the fringe benefits provided by employers were so comprehensive that one management writer concluded "it is now meaningful to label this web of employee benefit plans *the corporate social security system.*" H. Fox, "The Corporate Social Security System and Workman's Compensation," (*Conference Board Record* (Feb. 1974) p. 7 (emphasis in original), quoted in D. Allen, *Fringe Benefits: Wages or Social Obligation?* (1969), p. 249. See generally, *id.*, pp. 249-252, 254.

[16]Approximately 80 percent of all women bear children. See U.S. Bureau of the Census, "Fertility Expectations of American Women: June 1974," *Current Population Reports,* Series P-20, No. 277 (1975), Table 12.

employer on the same terms as a new hire; other employees, though rehiring is not guaranteed to them, if rehired will receive some recognition for former service. Examples of these contrasting approaches to rehiring after termination appear in *School District No. 1 v. Nilsen, supra,* 523 P.2d 1041 and *Black v. School Committee of Malden, supra,* 310 N.E.2d 330.

The school district in *Black* permitted teachers seeking reinstatement to return to their former positions at the same salary six months after childbirth, if such positions were still available. By contrast, in *Nilsen,* the school district required the resignation of untenured or probationary teachers who became pregnant. The district's policy that such a teacher, if rehired, lost credit toward tenure meant that the plaintiff, a third year probationary teacher, lost her opportunity to become tenured the following year and had to begin accumulating her credit anew.

Likewise, the petitioner in this case, Liberty Mutual, prior to 1967, terminated pregnant employees with no guarantee of reemployment, but would rehire if there was an opening. Upon rehiring, the women were treated like new hires, losing all credit for previous service to the company for purposes of fringe benefits. Under Liberty Mutual's income protection plan, for example, new hires were eligible for temporary disability benefits after three months and long-term disability coverage after five years. At the deposition of Liberty Mutual's personnel services manager, the effect of this policy upon such women was described as follows:

"Q. If I understand you correctly, if you had a female employee who was in your employ for ten years, she became pregnant, she would have been required to terminate her employment?

A. Correct.

Q. Then if she reapplied for employment and there was a position available and she was rehired, she would have lost whatever time had accrued under your income protection plan?

A. That's correct."

App., p. 44.

Under whatever terms, the effects of such terminations are severe for a woman whose income is critical to her family. She is likely to be ineligible for unemployment insurance, and if she seeks a job she is faced with potential employers who will not hire pregnant women. Even if she is lucky enough to be rehired by her former employers after childbirth, she is for the most part treated as a new employee, losing entirely the accumulated benefits from her prior service and finding herself in a job which may or may not have the same pay and responsibility as her previous job. In any case, she starts work all over again and must acquire job security, seniority, retirement rights, promotions, pay raises and fringe benefit eligibility anew. Her progress in the working world is necessarily permanently retarded.

Mandatory unpaid maternity leaves have a similar though somewhat mitigated effect on working women, depending in part on the duration of leave and the employment rights the employee is permitted to retain upon her return to work. Under some mandatory

leave policies, she cannot return for a designated period of time after childbirth;[17] under others, she *must* return by a certain date on pain of loss of certain employment rights or outright termination.[18] All these leave policies are arbitrary, since none takes into account the individual employee's health or ability to work, and all are different from the policies for other disabled workers.

Under most leaves, seniority does not continue to accumulate. Accumulated retirement, sick leave and vacation rights are often lost to the employee. R. Quinn, et al., "Evaluating Working Conditions in America," *Monthly Labor Review,* Vol. 96, No. 5 (1973), p. 37.[19]

The loss of retirement rights can, at the end of a woman's worklife, significantly postpone retirement, particularly if her leave occurred some years after she began working for her employer. The loss or nonaccumulation of seniority can have both immediate and long range effects. It can delay the availability of certain employment rights such as eligibility under company wage continuation programs. It can mean an inability to resist a layoff due to reduction in force or a delay in the ability to take promotional examinations or bid on better jobs. The

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[17] *See, e.g., Kornblum v. Newark Unified School District,* 37 Cal. App.3d 623, 112 Cal.Rptr. 457 (1974) (mandatory leave three months prior to delivery, no return before three months after childbirth or the following academic year, which ever comes first).

[18] *See, e.g.,* Liberty Mutual's current leave policy, App. 33.

[19] More than one in four women surveyed lose all employment benefits on leave. *Id.*

employer in *Satty v. Nashville Gas Company* ..... F.2d ....., 10 Emp. Prac. Dec. ¶10,359 (6th Cir. August 8, 1975), for example, permitted women to return to work six weeks after childbirth. Women who returned from leave were placed in temporary positions until a permanent position became available which was not bid on by a permanent employee. *Satty v. Nashville Gas Co., supra,* 10 Emp. Prac. Dec. ¶10,359. Unlike employees who were disabled, women on maternity leave lost accumulated seniority for job bidding purposes although they retained vacation and pension seniority. The plaintiff, Nora Satty, returned to work six weeks after childbirth, was placed in a temporary position with the company and proceeded to bid on three successive permanent job openings. In each case, however, a permanent employee with job seniority was awarded the position. Had she retained her job bidding seniority while on leave, Nora Satty would have been the senior bidder for each of the positions. Instead, Nora Satty's temporary job was ended and she was forced to apply for unemployment insurance *Id.* See also, *Zichy v. City of Philadelphia,* 392 F.Supp. 338 (E. D. Pa. 1975) (promotional examinations).

And, of course, leave periods mean the loss of wages for the pregnant employee just at the time when she, like other disabled employees, may need them most. This need may be exacerbated if her company health insurance policy, like many employer policies, does not cover the cost of maternity hospitalization at the same rate as other hospitalization. See, e.g., *Satty v. Nashville Gas Co., supra,* 10 Emp.

Prac. Dec. ¶10,359. As for other employees whose wages may be essential to their family's well-being,[20] the loss of income can mean difficulty in meeting incoming bills and credit repayment schedules, a circumstance which could compromise her ability to borrow in the future.[21] And, of course, there is a new child in the family and extra expenses are incurred for this reason as well.

The practical difference a sick leave, as contrasted with a maternity leave, can make to an employee is summed up in *Zichy v. City of Philadelphia, supra,* 392 F.Supp. 338, 340-341:

> When taking sick leave, a city employee continues to earn his or her normal salary and to accrue seniority, does not lose the privilege of taking promotional examinations for the time out, has the time out credited for service and

[20]In 1970, 3,726,000 babies were born. Of these, 398,700 were born to women who were single, divorced or widowed. U.S. Bureau of the Census, *Statistical Abstract of the United States, 1974,* p. 56, Table 76 (1974). Another 490,000 to 551,000 babies were born to married women heavily dependent on their own earnings. (This latter figure is computed on the assumption that the 3.9-4.4 million married women heavily dependent on their own earnings have a share in legitimate births equal to the proportion they are of all married women of childbearing age.) U.S. Bureau of the Census, "Money Income in 1973 of Families and Persons in the United States," *Current Population Reports,* Series P-60, No. 97 (1975), p. 87, Table 39; See also, U.S. Department of Health, Education and Welfare, "Wife's Earnings as a Source of Family Income," Social Security Administration, Research and Statistics Note No. 10 (1974), p. 4, 10-12.

[21]Since women make on the average 60.8 percent of what men make, according to figures recently released by the Census Bureau (San Francisco Chronicle (Mon., Sept. 1, 1975), p. 6, col. 1), an interruption in earnings can create a particularly acute financial strain for families heavily dependent upon the woman worker for its income, because such families find it difficult to accumulate liquid assets to tide them over during periods when income ceases or diminishes significantly.

> will receive the same raises as other employees in his or her classification who were not on sick leave. In addition, the employee continues to accumulate sick leave while on leave, will suffer no adverse effect on promotions, will resume the same position held prior to the commencement of such sick leave upon return, and will have no change in anniversary date of employment, pension plan, vacation time, and other fringe benefits as a result of using the sick leave.

The less tangible effects of pregnancy policies on the woman worker's psyche, motivation and commitments to the employer are incalculable. Employers have always understood the value of fringes:

> It must be remembered that we are not dealing with a mere gratuity, to be bestowed upon such objects of the donor's bounty as the donor or his trustee may select. On the contrary, the trust indenture represents a hard-headed business device to attract and hold employees.

D. Allen, *Fringe Benefits: Wages or Social Obligation?, supra,* p. 244, quoted from *Russell v. Princeton Laboratories,* 66 LRRM 2350 (1967). At some level, the treatment of pregnant women must be understood as an assessment by employers of the value of their women workers. The message, in too many instances, is as more freely articulated in earlier times: Women are marginal workers who are not worth the investment. Arbitrary pregnancy rules contribute to making this a self-fulfilling prophecy.

Finally, even the small percentage of women workers who never become pregnant do not escape the

effects of the employer's concern about pregnancy. Young women applying for jobs find they are asked about family plans and what method of birth control they use.[22] Based on the possibility that they might become pregnant, they are not offered certain jobs or are placed in the low paid, dead-end jobs which characterize women's place in the labor force today. See, generally, U.S. Dept's. of Labor and Health, Education, and Welfare, *Manpower Report to the President* (1975), *supra,* pp. 60, 61, and, *Report of the Twentieth Century Fund Task Force on Women and Employment: Exploitation from 9 to 5* (1975), p. 60. Cf. *Cheatwood v. South Central Bell Telephone & Telegraph Company,* 303 F.Supp. 754, 759-60 (M. D. Ala. 1969) (all women denied job of commercial representative, in part because the employer felt that if they became pregnant they could not perform job). Jobs which are part of a promotional ladder in the company are denied them because it is assumed they lack long term job commitment, and the promotions themselves are not forthcoming for the same reason.

If ever the assumptions of marginal workforce attachment of women were justified, they are no longer. Career commitment and occupational aspirations are on the rise among women. The labor force participation of women, particularly married women

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[22]Wetzel, in her complaint filed with the Pennsylvania Human Relations Commission, alleged that she was subjected to inquiries about anticipated marriage and family size as a condition of hire. Ross, in her complaint filed with the Equal Employment Opportunity Commission, alleged she was questioned regarding marital situation and birth control. See, respondent Wetzel's brief to the 3d Circuit, p. 6.

and women with young children, has undergone a steady and dramatic change in recent years. Mothers with school-age children are just as likely to work today as were unmarried women in 1950. U.S. Dep'ts. of Labor and Health, Education and Welfare, *Manpower Report to the President* (1975), *supra,* pp. 57-58. The most dramatic increase in participation has occurred among women with pre-school aged children, one-third of whom are now in the workforce. H. Hayghe, "Labor Force Activity of Married Women," *Monthly Labor Review,* Vol. 96, No. 4 (1973), p. 31. Women, including new mothers, are in the workforce to stay.[23]

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[23]Contributing to workforce participation are the lower birth-rate, later marriage, and rising divorce and separation rates. U.S. Dep'ts. of Labor and Health, Education and Welfare, *Manpower Report of the President,* (1975) pp. 56-57.

> Over the past decade, female-headed families with children have grown almost ten times as fast as two-parent families. . . . Moreover, it appears that this shift in family structure has accelerated in the last few years; there were one million more mothers heading families in 1973 than in 1970, an increase which exceeds the new growth over the entire previous decade. . . .

I. Sawhill, "Discrimination and Poverty Among Women Who Head Families", *Signs: Journal of Women in Culture and Society* (Dec. 1975) (forthcoming). These reasons for greater workforce participation of women confirm the fact that many women work because they must.

On three occasions last term, this Court has recognized the significant change in the workforce participation of women and the harm done to them by sex-role stereotypes based on outmoded notions about life patterns and workforce commitment. *See Stanton v. Stanton,* ___ U.S. ___, 95 S.Ct. 1373, 1378 (April 15, 1975); *Weinberger v. Wiesenfeld,* ___ U.S. ___, 95 S.Ct. 1225, 1231 n. 11 (March 19, 1975); *Taylor v. Louisiana,* ___ U.S. ___, 95 S.Ct. 692, 700 n. 17 (Jan. 21, 1975).

C. Employer Pregnancy Policies Penalize And Burden Working Women's Procreative Choice.

Amici have documented in Section I-B above the sweeping impact of employer pregnancy practices upon women's status in the workforce. Because they jeopardize women's immediate economic position and long-term workforce status, these pregnancy rules have an additional and equally invidious effect: they burden women's procreative choice.

In a series of recent decisions, having their origin in *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942), this Court has declared that the decision whether to bear or beget a child is "so rooted [in our traditions] . . . as to be ranked as fundamental." *Snyder v. Massachusetts,* 291 U.S. 97 (1934). See *Cleveland Board of Education v. La Fleur,* 414 U.S. 632, 639 (1974); *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 35 n. 76 (1973); *Roe v. Wade,* 410 U.S. 113, 152-153 (1973); *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972); *Griswold v. Connecticut,* 381 U.S. 479 (1964). Of particular relevance to this case is the Court's recognition in *La Fleur* that an employer's rules respecting pregnancy can "penalize" or "constitute a heavy burden on the exercise of these protected freedoms." *Cleveland Board of Education v. La Fleur, supra,* 414 U.S. at 639.

The galaxy of special restrictions and exclusions affecting pregnancy—of which the compulsory maternity rules invalidated in *La Fleur* are but one component—do not directly deprive a woman of her right

to decide to bear a child. They do, however, have a substantial impact upon that right, operating in some cases to foreclose the choice of childbearing altogether, or more generally, to condition that choice upon the short and long-term sacrifice of employment security and opportunity and the concomitant suffering of economic hardship against which all other temporarily disabled workers are protected.

The dire consequences for working women of discriminatory pregnancy rules are illustrated in the records of related cases challenging the employer pregnancy rules. *See, e.g., Newmon v. Delta Airlines, Inc.,* 475 F.2d 768 (5th Cir. 1973) (plaintiff lost her employee benefits plus the right to reinstatement); *Holthaus v. Compton,* 514 F.2d 641 (8th Cir. 1975) (plaintiff lost her job because of one month's absence due to miscarriage); *Gilbert v. General Electric,* 375 F.Supp. 367 (E.D. Va. 1974), aff'd, ... F.2d ..... (a G.E. employee who worked until five weeks before childbirth was impoverished by virtue of the denial of disability benefits and had to resort to Welfare Aid after having her utilities cut off).

Though the lower court decisions holding Title VII applicable to pregnancy issues have focused primarily on the sex-discriminatory aspects of differential or exclusionary treatment of pregnancy, several of these decisions have recognized—as did this Court in *La Fleur*—the concomitant infringement upon the fundamental right to procreate. In *Hutchison v. Lake Oswego School District,* the district court ruled that "[t]he classification [excluding pregnancy from accrued sick leave] also discriminates because it requires plaintiff to choose between employment and pregnancy." 374 F.Supp. 1056, 1063 (D. Ore. 1974), aff'd, ... F.2d ....., 10 Emp. Prac. Dec. ¶10,325 (9th Cir. July 21, 1975). See also *Buckley v. Coyle Public School System,* 476 F.2d 92, 96 (10th Cir. 1973) (automatic termination of employment after six months); *Robinson v. Rand,* 340 F.Supp. 37, 38 (D. Colo. 1972) (automatic discharge because of pregnancy). In *Gilbert v. General Electric Company, supra,* the district court rejected the argument that the legal accessibility of abortion can be deemed to mitigate the impact of excluding pregnancy from disability benefits:

> Indeed, under G.E.'s policy the consequence of a female employee exercising her innate right to bear a child may well result in economic disaster, as in the case of at least one of the witnesses who appeared before this court . . . . [W]omen are required to undergo the economic hardship of the disability which arises from their participation in the procreative experience . . . . While it is true that women may, under certain conditions, resort to an abortion . . . it cannot be reasonably argued that Congress in its enactment of Title VII ever intended that an intended beneficiary of that Act forego a fundamental right, such as a woman's right to bear children, as a condition precedent to the enjoyment of the benefits of employment free of discrimination. 375 F.Supp. at 381.

See also *Griswold v. Connecticut, supra,* 381 U.S. at 479 (Goldberg, J., concurring); *Andrews v. Drew Municipal Separate School District,* 507 F.2d 611, 615 (5th Cir. 1975).

Thus, employer pregnancy rules not only affect the work status of women in pervasive and permanent ways, but also impose on working women the Hobbesian choice between employment and equal employment opportunity on the one hand and the exercise of their right to procreate on the other. As such, these rules not only discriminate against women, but also penalize them for exercising "one of the basic civil rights of [wo]man" recognized as "fundamental" in the historic teachings of this Court. See *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975).

II. THE HIGHER COST OF DISABILITY COVERAGE FOR WOMEN IS DUE TO THEIR CONCENTRATION IN LOW PAID JOBS RATHER THAN THEIR GENDER, AND THE COST OF ADDING CHILDBIRTH DISABILITIES TO INCOME PROTECTION COVERAGE IS MODERATE.

The employers who are petitioners and amici in this case repeatedly assert that the exclusion of childbirth disabilities from wage continuation plans does not discriminate against women because women as a class already receive a disproportionate advantage under existing disability plans,[24] and in addition that

[24]If women receive "preferential treatment" under employer sickness and accident plans, minority workers are even more "favored", since the disparities in disability rates are far greater between whites and minorities than they are between men and women. In 1968, minority persons lost 8.1 days from work compared to 5.1 for Caucasian workers; males lost 5.2 days, compared to 5.9 for females. United States Department of Health, Education and Welfare, Public Health Service, *Time Lost from Work Among the Currently Employed Population, United States: 1968*, Vital and Health Statistics, Series 10, No. 71, (1972), Table 7.

the cost of adding childbirth disabilities would further skew such plans in favor of women.[25]

Such contentions omit the reality that income protection plans are but one of several ways in which employers compensate disability days, under some of which men typically cost the company more than women. They are also a cynical confounding of cause with effect to the detriment of their women employees. Low income workers, not women, have a higher incidence of disability. The disproportionate concentration of women in low paying jobs is a major cause of women's apparently higher incidence rates. Moreover, the addition of childbirth disability coverage under such plans, like the addition of any other disability risk category, will cost money, but the cost is simply not of the magnitude that employers participating in this case contend.

[25]As discussed in detail in the text, *infra*, women are not "favored" under such plans. But even if women as a group had, under some wage continuation arrangements somewhat more disability days than men, any individual woman may have no disabilities, or fewer disability days than the average man. Title VII prohibits the unequal treatment of individuals because of characteristics attributed to the sex or race to which they belong. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Rosen v. Public Service Electric & Gas Co.*, 477 F.2d 90, (3d Cir. 1973); *Rosenfeld v. Southern Pacific Company*, 444 F.2d 1219 (9th Cir. 1971); *Bartmess v. Drewrys USA, Inc.*, 444 F.2d 1186, (7th Cir. 1971); *Manhart v. City of Los Angeles*, 387 F.Supp. 980, (C.D. Cal. 1975). To offer the group characteristic as a justification for denying benefits to individual women is therefore contrary to the fundamental principle of Title VII. Assertion of group disability characteristics cannot disguise the effect of the exclusion of pregnancy and childbirth disabilities from sickness and accident plans: each male employee is covered for all disabilities which he may suffer; every woman employee is not.

A. Salary Level Rather Than The Sex Of The Individual Determines The Disability Incidence Rate.

The best indicator of total employer cost for employee absence from work—a measure which includes days missed due to pregnancy-related disability[26]—is days missed from work per year. Even without factoring in individual earnings, family income, or age, all of which have a significant impact on work loss days,[27] the sex differences in work loss due to illness and disability are minor indeed. In some years, men lost more days from work than did women. In others, women's days lost have slightly exceeded men's.[28] In each year the difference in days missed

[26]Citizen's Advisory Council on the Status of Women, *Women in 1971* (1972), p. 55.

[27]See, e.g., U.S. Bureau of the Census, *Persons with Work Disability: 1970* (Jan. 1973), Tables 6 (age, occupation), 9 (age, earnings), 10 (age, family income); U.S. Department of Health, Education and Welfare, Public Health Service, *Disability Days: 1968*, Vital & Health Statistics Series 10, No. 67 (1972), Tables E and F (family income, age).

[28]In 1965-1966, 1964-1965, 1963-1964, men lost more days than women. U.S. Department of Health, Education & Welfare, *Time Lost from Work Among Currently Employed Population, United States: 1968*, Vital & Health Statistics, Series 10, No. 71 (1972), Table A. (Hereinafter "Time Lost from Work"). In 1968, men lost 5.2 days compared to 5.9 for women, a difference of approximately 5 and one half *hours* per year. *Id.* In 1968-1969, men lost 5.1 days and women 5.5, a difference of approximately three *hours* per year. *Id.* In the 17 to 44 year old age group, women missed more days than men that year, but men lost more days than women in the 45-64 year old age group. U.S. Department of Health, Education & Welfare, Public Health Service, *Age Patterns in Medical Care, Illness, and Disability, United States, 1968-1969* (1972), Table 17. The most recent available national statistics, those for 1972, indicate that men missed 4.9 days and women 5.5, a difference of less than five *hours* per year. U.S. Department of Health, Education, & Welfare, Public Health Service, *Current Estimates from the Health Interview Survey, United States—1972*, Vital & Health Statistics Series 10, No. 85, (1973), Table 16.

between men and women was less than a single day. Therefore, in the "total universe" of employer income protection provisions, a universe which includes sick leave, sickness and accident plans, long range disability plans and worker's compensation for occupational injury,[29] the cost to the employer for work days lost can be expected to be approximately the same for the average woman as for the average man.[30]

Moreover, within the category of work disabilities covered by sickness and accident plans, wage or salary

[29]U.S. Women's Bureau, "Facts About Women's Absenteeism and Labor Turnover" (1969).

[30]If income and other factors are not taken into account, women on the average have a higher incidence of acute conditions, whereas men have a higher incidence of chronic illness. *See, e.g.*, Dept. of Health, Education and Welfare, *Acute Conditions, Incidence and Associated Disability—U.S. July 1972-June 1973*, Vital and Health Statistics Series 10, No. 98 (1974), Table 10; U.S. Department of Health, Education and Welfare, *Current Estimates from the Health Interview Survey—1972*, Vital and Health Statistics Series 10, No. 98 (1974), Table 9 (hereinafter *"Current Estimates"); Current Estimates—1971, supra* (1973), Table 6, 9. Men have a higher rate of injury, both occupational and nonoccupational. *Current Estimates—1972, supra*, Table 6, 10, 11, 12. Given these tendencies. women workers are likely to account for more sick leave and short term disability days, whereas men constitute a significantly heavier drain on long term plans and workers compensation. See Dep't. of Industrial Relations, Division of Labor Statistics and Research, *California Work Injuries 1973* (Dec. 1974), Tables 18 and 21; Department of Human Resources Development, *Female & Minority Labor Force Estimates*, Report 400F (Oct. 22, 1973); "Frequency and Duration of Disability Among Company Employees in 1971-72," *Metropolitan Life Statistical Bulletin* Vol. 55 (Oct. 1974); U.S. Dep't. of Commerce, Bureau of the Census, *Persons With Work Disability: 1970* (Jan. 1973), Table 9, see Appendix. U.S. Dep't. of Labor, "Facts About Women's Absenteeism and Labor Turnover" (August 1969), p. 1. Each of these measurements of acute and chronic illness and injury forms a part of the relevant statistic which is days lost from work due to disability.

level, rather than sex, is the primary predictor of work loss due to disability. United States Census data shows that disability rates decline as wages rise, and *that the disability rates for men and women are almost the same, although men in every income category have a slightly higher disability rate.* U.S. Census Bureau, *Persons with Work Disability: 1970* (1973), Table 9, described in the Appendix to this brief.[31]

If, then, companies like Liberty Mutual and American Telephone and Telegraph assert that their women workers have a significantly higher disability rate than their male workers, one would suspect that their women workers are highly concentrated in low paying jobs. And, indeed, in the case of these two companies, the prediction is strikingly confirmed.

Liberty Mutual's employees are divided into two broad categories, technical and clerical. App., p. 31. The clerical employees provide the secretarial staff support for the technical employees, App., p. 31, and are predominantly female.[32] At the entry level, the technical employees are in two jobs, claims adjuster

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[31]See also, S. Riesenfeld, *Temporary Disability Insurance,* Hawaii Legislative Reference Bureau Report No. 1 (1969), pp. 86, 87, Table 29. Family, as compared to individual, income is a less reliable measure of disability rates because it typically includes high male and low female incomes, but it also generally confirms the inverse relationship of income and disability. Department of Health, Education and Welfare, *Time Lost From Work Among Currently Employed Population, U.S.: 1968, supra,* Table B.

[32]Although the record does not show how many of the clerical employees are women, there is no reason to believe that the gender composition of the secretaries at Liberty Mutual differs dramatically from the norm.

and claims representative, the basic functions of which are "the application of the necessary technical skills to investigate and bring about the proper disposition of claims against the company." *Wetzel v. Liberty Mutual Ins. Co.,* 508 F.2d 239, 243 (3d Cir. 1975). The educational requirements for the two jobs are the same, a college degree; neither job requires previous experience. *Wetzel v. Liberty Mutual Insurance Company,* 372 F.Supp. 1146, 1150 (W.D. Pa. 1974). Between 1965 and 1970, Liberty Mutual hired more than 2000 claims adjusters, all of whom were men. Between 1965 and 1972, the company hired 2,329 claims representatives, 98.84% of whom were women. *Id.* at 1151. Claims adjusters were paid approximately $2500 more per year than claims representatives. *Id.,* at 1151. The only supervisory positions open to the female claims representatives involved the immediate supervision of claims representatives. Claims adjusters could be promoted to those positions and to numerous other supervisory and management positions in the company. *Wetzel v. Liberty Mutual Insurance* Company, *supra,* 508 F.2d at 258. In short, Liberty Mutual's women employees were exclusively relegated to the low-paid, dead-end jobs, whereas men were in almost all of the higher paid entry level and management jobs.

American Telephone and Telegraph's Bell system companies employ more women than any other company in the United States. In 1971, 400,000 women worked for AT&T's operating companies and constituted more than half their employees. 118 *Cong. Rec.*

4507, 4510 (92d Cong., 2d Sess. Feb. 17, 1972).[33] In that year, almost every single job in the operating companies was sex segregated. *Id.*, at 4510, Table 4. Every major low paying job was a "female" job and every better paying job was without exception[34] a "male" job. *Id.*, at 4511. Forty percent of the Bell system's women employees (and 28 percent of all its employees) were telephone operators. The operator job was (and remains) the lowest paying and least desirable major job in the system. *Id.*, at 4508. A 1970 report by the Southwestern Research Institute describes the operator job as follows:

> "[Operators are quick to describe] the noxious demands of work that is too highly structured, their loss of personal identity, their lack of freedom to rely on their own judgment, their difficulty in becoming part of a cohesive social group, and the absence of any reasonable hope for future advancement. . . . They are necessary parts of a system designed by geniuses for execution by idiots."

Id., at 4508. Promotional ladders, too, were sex segregated in the Bell operating companies. Almost 94 per-

[33]The information on AT&T's employment practices is contained in an Equal Employment Opportunity Commission study of Bell System employment entitled *"A Unique Competence": A Study of Equal Employment Opportunity in the Bell System* (1972) submitted in a proceeding before the Federal Communications Commission. The report was reprinted in the Congressional Record at the request of the Hon. Shirley Chisholm, member of the House of Representatives from New York.

[34]The *average* weekly wage of women with two to five years seniority in the Bell System in Fiscal 1970-1971 was $111.75. Brief Amicus Curiae of American Telephone and Telegraph Company, Appendix, p. 9a (hereinafter, "AT&T Brief").

cent of female managers were at the first (bottom) level of management. *Id.*, at 4511-12; virtually none reached the third level. Forty-five percent of the male managers were at level two or above.[35] *Id.*, at 4511-4512.

Under the circumstances, the fact that "women received compensation for 63.45 percent of the total benefits days though representing only 48.29 percent of employees eligible for benefits" in 1971-1972 (Petitioner's Brief, p. 22, no. 43, AT&T Brief, p. 54) is no surprise. Rather than constituting proof of the costly "frailty" of women, it is testimony to the deeply entrenched workforce segregation of and discrimination against women in the Bell System Companies. As in *Frontiero v. Richardson*, 411 U.S. 677, 689 n. 22 (1973), it can truly be said that AT&T, Liberty Mutual and employers like them who excuse their refusal to cover pregnancy and childbirth disabilities on the ground that women already receive a larger share of the benefits have "seized upon a group—women—who have historically suffered discrimination in employment, and rely upon the effects of this past discrimination as a justification for heaping on additional economic disadvantages."

[35]Under the circumstances, it is no surprise that the one category in which men's disability exceeds women's in the Bell companies is "diseases of circulatory system" which includes heart attacks and other cardiac problems. AT&T Brief, Appendix, pp. 13a, 14a, Tables 2, 3. Women never get high enough in the Bell system to fall prey to the special tensions and pressures that give rise to heart conditions.

B. The Cost Of Adding Childbirth Disabilities To Liberty Mutual's Income Protection Plan Is Moderate.

The addition of childbirth disability coverage under employer income protection plans, like the addition of any other previously excluded risk category, will cost money, but the cost is simply not of the magnitude that that Liberty Mutual contends. As discussed above, the sex difference in work lost due to illness and disability nationally—*including* workloss due to pregnancy-related disabilities—is very slight—less than a single day. See footnotes 28 and 30, *supra*. The federal civil service experience with sick leave, which is given for pregnancy- and childbirth-related disability, substantially confirms the national figures. President's Commission on the Status of Women, *Report of the Committee on Federal Employment,* p. 31. The U.S. Public Health Service, in a tabulation performed for the Citizens Advisory Council on the Status of Women, calculated that time lost from work because of childbirth *and* disorders of pregnancy averaged one hour and 20 minutes per woman in the fiscal year 1966-1967. Citizens Advisory Council on the Status of Women, *Women in 1971, supra,* p. 55.

The moderate cost of including childbirth disabilities under sick leave policies is confirmed in a study of the costs to employers of implementing the EEOC guidelines on pregnancy-related disability made by the Federal Reserve Bank of Boston. The Bank concludes that "the results suggest that the costs would have negligible impact on overall labor costs." C. Greenwald, "Maternity Leave Policy," *New England Economic Review* (Federal Reserve Bank of Boston, Jan.-Feb., 1973), p. 18. The Bank, using its own staff for the study, found that treating pregnancy disability in a manner identical to other illnesses would have had the same effect as adding between $.004 and $.01 to the hourly wage of its employees,[36] representing an increase to its labor costs of between one-tenth and two-tenths of one percent.[37]

The Federal Reserve Bank study confirms the general accuracy of respondent's calculation that the cost of adding childbirth disabilities to Liberty Mutual's income protection plan would be about twenty-five cents per week per employee. See Respondent Wetzel's brief to the Third Circuit, pp. 42-43.[38]

Liberty Mutual's estimates of dramatic increases in the cost of coverage are based on a hodge-podge of inflated and misleading statistics. The AT&T cost estimates which it quotes are based on a *5½ month average disability* duration, a duration which even AT&T now rejects as excessive. AT&T Brief, Appendix, p. 6a. The California estimate of 33 to 36% in *Geduldig v. Aiello,* 417 U.S. 484 (1974) is patently incorrect, since it was the figure given in the trial court which

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[36]The lower end of the range was based on the assumption of absences averaging ten weeks, the upper end on absences averaging 14 to 16 weeks. *Id.*, at 17, Table 3.

[37]A one-time increase of wage levels by a half cent per hour can be put into further perspective by considering that the annual increase in per hour earnings levels in the United States private sector has been at or above 18 cents per hour in each of the last five years. U.S. Dep't. of Labor, *Employment and Earnings* (June 1975), p. 83, Table C-1.

[38]This amount of increased cost is based on an average childbirth-disability duration of eight weeks.

included complications of pregnancy. Moreover, it too was based on an inflated estimate of the duration of childbirth disabilities. Brief of Appellees in *Aiello,* p. 84 and p. 85, n. 115. Finally, the "experiences" described for the New Jersey, Hawaii and Rhode Island state disability plans are highly misleading. The so-called New Jersey "experience" is based on the experience under one of three separate funds, the "disability during unemployment" fund, which accounts for only 10% of total New Jersey disability benefits but 74% of the disabilities due to childbirth. Supplemental Brief of Appellees in *Aiello,* pp. 3-6. The Hawaii "experience" is in fact only the experience of one insurance company, Equitable Life Assurance Society, which accounts for a minute percentage of the disability coverage in Hawaii. At least 90 percent of the employees in Hawaii are insured by six insurers, only one of which raised its rates *at all. Id.,* pp. 7-9. Rhode Island's unfortunate "experience" with pregnancy was due to its failure to apply to disabilities arising from it the same standards and duration controls that it maintained for other disabilities. See E. Koontz, "Childbirth and Child Rearing Leave: Job-Related Benefits," 17 N.Y.L. Forum 480, 484-85 (1971).

In any event, it was not the cost of covering childbirth disabilities that motivated Liberty Mutual to exclude them from its income protection plan. The company did not even raise the cost issue in the trial court. *Wetzel v. Liberty Mutual Insurance Co., supra,* 372 F.Supp. 1146. When its personnel manager was asked why its plan excludes childbirth disabilities, he

replied, "On advice of counsel." App. p. 43. Until 1967, Liberty Mutual fired pregnant employees and even today excludes not only childbirth disabilities, but any "disability due to pregnancy or any cause related to pregnancy." Brief of Petitioner, App. A., p. A-3. One can only suspect that the reason why Liberty Mutual excludes all pregnancy-related disabilities from its income protection plan is not cost but rather because of its unwillingness to accord its women employees full and equal status in its workforce.

III. TITLE VII PROHIBITS DISCRIMINATION AGAINST WOMEN UNDER EMPLOYER PREGNANCY POLICIES

Liberty Mutual's defense of its exclusion of pregnancy disabilities from its income protection plan centers upon its contention that *Geduldig v. Aiello,* 417 U.S. 484 (1974), a case decided under the Fourteenth Amendment to the Constitution, resolves the issue whether pregnancy discrimination is sex discrimination under Title VII. Liberty Mutual relies on a footnote to *Aiello,* in which this Court states that the exclusion of childbirth disabilities from coverage under California's state disability insurance program is not sex discrimination under the Fourteenth Amendment "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other." 417 U.S. at 496-497, n. 20.

If constitutional and statutory construction were a matter of abstract symmetry, one constitutional inter-

pretation resolving all similar questions of statutory construction, perhaps Liberty Mutual would prevail. Rather, each legislative enactment, as well as each constitutional provision, is to be interpreted in light of its transcendant purposes and specific provisions. In passing legislation, Congress is not bound by the minima required by the Constitution. Compare, *e.g.*, *Lassiter v. Northampton County Bd. of Election,* 360 U.S. 45 (1959) (upholding the constitutionality of a state voter literacy test) with *Katzenbach v. Morgan,* 384 U.S. 641 (1966) (upholding a provision of the Voting Rights Act of 1965 which prohibited certain state voter literacy requirements). See also, *Oregon v. Mitchell,* 400 U.S. 112, 141, 248-249, 286-287 (1970); *Espinoza v. Farah Manufacturing Co.,* 414 U.S. 86, 91 (1973). Accordingly, the Fourteenth Amendment neither fixes the scope of Title VII's prohibition of sex discrimination nor informs its interpretation.

The question, therefore, is what conduct Congress intended to prohibit when it enacted Title VII. Viewing employment discrimination as a complex and pervasive phenomenon, manifested in systems and effects as well as isolated acts of ill-will, Congress intended to protect workers from all forms of disparate treatment because of race, color, religion, sex or national origin. See S. Rep. No. 92-415, 92d Cong., 1st Sess. 5 (1971.)

The language of the Act's non-discrimination provisions reveals the breadth of this purpose. Not only does the Act prohibit "discrimination against any individual with respect to his compensation, terms, conditions, or privileges of employment," but it also forbids classification of employees *"in any way* which would deprive *or tend to deprive* any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex or national origin." Section 703(a)(1)(2), 42 U.S.C. § 2000e-2(a)(1)(2) (emphasis added).

This Court, considering the intent of the Act for the first time, described its scope in terms which gave full play to the Congressional purpose:

> The Act proscribes not only overt discrimination but also practices which are fair in form, but discriminatory in operation. . . .
>
> Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.

Griggs v. Duke Power Co., 401 U.S. 424, 431-432 (1971). See also *Albemarle Paper Co. v. Moody,* ..... U.S. ....., 95 S. Ct. 2362, 2374 (1975); *Espinoza v. Farah Manufacturing Co., supra,* 414 U.S. 86, 92. The elimination of "built-in headwinds" to the realization of full employment opportunities was declared by *Griggs* to be a goal of Title VII:

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Griggs, 401 U.S. at 431.

Applying this general intent to the Act's specific prohibition of sex discrimination, the Seventh Circuit, noting that Congress had not confined the scope of the Act to discriminations based "solely" on sex,[39] stated:

> In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past. The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex . . . or through the unequal application of a seemingly neutral company policy. . . .

Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971). See also *Rosen v. Public Service Electric and Gas Co.*, 477 F.2d 90, 95 (3d Cir. 1973).

In the absence of any specific indication of Congressional intent on the pregnancy issue, it is the language and dominant purpose of Title VII which must directly determine the validity of Liberty Mutual's policy of denying disability benefits to women employees unable to work because of pregnancy-related

[39] Amendments in the House and Senate intended to narrow the scope of Title VII's prohibitions by restricting the Act to discrimination "solely" on the basis of race, sex, national origin or religion were defeated. 110 *Cong. Rec.* 2728 (88th Cong., 2d Sess., Feb. 10, 1964). Compare *Reed v. Reed*, 404 U.S. 71, 75-76 (1971), which states that only discrimination based "solely" on sex is prohibited by the Fourteenth Amendment.

disability. See *Carter v. Panama Canal Company*, 463 F.2d 1289, 1300 (D.C. Cir. 1972). It is *amici's* contention that to exclude discriminatory pregnancy rules and practices from coverage under Title VII would be inconsistent with the language and purposes of Title VII.

Pregnancy disabilities are "ineluctably sex-linked," the result of a physical structure and biological potential which, more than any other characteristic, defines a person as female. Unfair pregnancy rules have almost always been based on the employer's stereotypes about a pregnant woman's future work commitment and abilities, rather than on the physical realities and job-related requirements of that condition. (Section I-A, *supra.*) Today, such rules affect the wages, job opportunities, and promotions of working women, the substantial majority of whom become pregnant at some point in their working lives. (Section I-B, *supra.)*

As the Fourth Circuit states in *Gilbert v. General Electric*, ... F.2d ..... 10 Emp. Prac. Dec. ¶10,269 (4th Cir. 1975): "Any discrimination, such as that here, which is 'inextricably sex-linked' in consequences and result, is violative of the Act." Every Circuit which has considered the issue since *Geduldig v. Aiello* has so concluded. *Communication Workers of America v. American Telephone and Telegraph Company*, 513 F.2d 1024 (2d Cir. 1975); *Wetzel v. Liberty Mutual Insurance Company, supra*, 511 F.2d 199 (3d Cir. 1975); *Gilbert v. General Electric Co., supra*, ... F.2d ....., 10 Emp. Prac. Dec. ¶10,269 (4th Cir. June 27,

1975) *Holthaus v. Compton & Sons,* 514 F.2d 651 (8th Cir. 1975); *Hutchison v. Lake Oswego School District,* ..... F.2d ....., 10 Emp. Prac. Dec. ¶10,325 (9th Cir. July 21, 1975).

Significantly, the Equal Employment Opportunity Commission ("EEOC"), the agency entrusted by Congress with interpreting and enforcing Title VII, has also concluded that pregnancy discrimination is prohibited by the Act. In its Sex Discrimination Guidelines, the EEOC states, *inter alia,* that pregnancy disabilities must be treated for all employment related purposes like other disabilities. 29 C.F.R. §1604.10.[40] The EEOC Guidelines are entitled to great deference, *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-434 (1971); *Albemarle Paper Co. v. Moody,* ..... U.S. ..... (1975), 95 S. Ct. 2362, 2378, unless "application of the guideline would be inconsistent with an obvious Congressional intent not to reach the employment practice in question"; *Espinoza v. Farah Manufacturing Co., Inc.,* 414 U.S. 86, 94 (1973).

[40]Section 1604.10(b) provides:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

Nothing in the Congressional history, compelling or otherwise suggests that the EEOC's interpretation is incorrect.[41] Indeed, in light of the language as well as the general intent of the Act, the Guidelines are, as the Fourth Circuit Court of Appeals concluded in *Gilbert v. General Electric,* ..... F.2d ....., 10 E.P.D. ¶10,269 n. 12 (4th Cir., June 27, 1975), "merely expressive of what is the obvious meaning and purpose of the Act."

The correctness of the EEOC's interpretation is evident not only from the intent and scope of the Act itself but also from Congressional and governmental agency treatment of pregnancy- and childbirth-related disabilities under other Federal legislation both prior to and after the EEOC issued its pregnancy guide-

[41]The fact that the 1972 issuance of the pregnancy guidelines express the EEOC's evolving perception of the discriminatory effects of the special treatment of pregnancy on equal employment opportunity can hardly be held to invalidate the guideline. This evolutionary process was not limited to sex discrimination nor to the EEOC. The Report of the Senate Committee on Labor and Public Welfare recommending passage of certain amendments to strengthen Title VII enforcement states:

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization . . . Experience has shown this view to be false.
>
> Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of systems and effects rather than simply intentional wrongs. . . .
>
> In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful. (S. Rep. No. 92-415, 92d Cong., 1st Sess. 5 (1971).)

See also H.R. Rep. 92-238, 92d Cong. 2d Sess. 8 (1971).

lines in 1972. The Railroad Unemployment Insurance Act, amended in 1946 to include temporary disability coverage, explicitly includes within its definition of "sick day," a day in which an employee cannot work because of pregnancy, miscarriage, or the birth of a child. 45 U.S.C. §351(k)(2).

Moreover, the United States Civil Service Commission has always interpreted the statute entitling federal employees to sick leave with pay to include childbirth- and pregnancy-related disabilities, even though the statute neither explicitly includes nor requires it. 5 U.S.C. §6307. See President's Commission on the Status of Women, *Report of the Committee on Federal Employment, supra,* p. 31.

Finally, Congress has indicated its approval of pregnancy regulations issued pursuant to a federal nondiscrimination law. Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, provides that "No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."

The implementing regulations, which took effect on July 21, 1975 after the receipt by H.E.W. of nearly 10,000 public comments, the signature of the President and considerable Congressional debate, include a provision the requirements of which are identical to those of the EEOC's pregnancy guideline. 45 C.F.R. Part 86, *Federal Register* Vol. 40, No. 108 (June 4, 1975), p. 24144. Section 86.57(c) provides:

> A recipient [of federal funds] shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.[42]

Thus, not only have the Government and Congress treated pregnancy related disabilities like other disabilities under paid sick leave programs, but also Congress has approved regulations which interpret the failure to do so as sex discrimination under federal law. Given these facts, there can be no doubt that the EEOC pregnancy guidelines properly and accurately interpret the requirements of Title VII.

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[42]The regulations also provide that recipients must not discriminate against students on the basis of pregnancy or childbirth by excluding them from classes or programs, or by treating disabilities which arise therefrom differently than any other temporary disability with respect to medical or hospital benefits, services, plans or policies. 45 C.F.R. § 86.40.

CONCLUSION

For all of the foregoing reasons, as well as those urged by respondents, the decision of the Third Circuit Court of Appeals should be affirmed.

Dated, September 22, 1975.

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(Appendix Follows)

APPENDIX

APPENDIX

PRESENCE AND DURATION OF WORK DISABILITY FOR PERSONS 18 TO 64 YEARS OLD WITH WAGE OR SALARY INCOME IN 1969*

MEN

AGE 18-64	% With No Work Dis-Ability	Total % With Dis-Ability	Partial Disability							Com-Plete Dis-Ability
			Total	Less Than 6 Mos.	6-11 Mos.	1-2 Yrs.	3-4 Yrs.	5-9 Yrs.	10+ Yrs.	
TOTAL	91.09	8.91	7.73	.70	.52	1.13	1.10	1.27	3.02	1.18
1 - 999	84.73	15.27	10.74	.85	.85	1.87	1.54	1.57	4.07	4.53
$ 1000-1999	87.94	12.06	9.33	.82	.86	1.63	1.40	1.38	3.23	2.78
$ 2000-2999	87.74	12.26	9.86	.94	.98	1.68	1.39	1.43	3.43	2.41
$ 3000-3999	87.80	12.20	10.26	.96	.89	1.70	1.42	1.58	3.70	1.94
$ 4000-4999	88.40	11.60	10.10	.89	.75	1.56	1.44	1.71	3.74	1.50
$ 5000-6999	90.04	9.96	8.99	.84	.57	1.27	1.31	1.52	3.48	.98
$ 7000+	93.47	6.53	6.07	.55	.32	.78	.86	1.04	2.54	.46
7000-9999**	92.33	7.67	7.08	.64	.38	.92	1.01	1.23	2.90	.60
10,000-14,999**	94.07	5.93	5.55	.49	.27	.70	.77	.95	2.36	.38
15,000+**	94.41	5.59	5.27	.43	.26	.66	.75	.89	2.27	.32

*Calculated from: U.S. Dep't. of Commerce, Bureau of the Census, Persons with Work Disability: 1970 (Jan. 1973), Table 9. Presence and Duration of Work Disability for Persons 18 to 64 Years Old by Earnings in 1969, Type of Earnings, Race, Spanish Origin, Sex, and Age, 1970.

**Calculated from "Earnings" category, rather than "Wage and Salary" category, because "Wage and Salary" figures are available only up to the $7000+ bracket. "Earnings" includes both wage and salary and self-employment income.

APPENDIX

PRESENCE AND DURATION OF WORK DISABILITY FOR PERSONS 18 TO 64 YEARS OLD WITH WAGE OR SALARY INCOME IN 1969*

WOMEN

AGE 18-64	% With No Work Dis-Ability	Total % With Dis-Ability	Partial Disability						Com-Plete Dis-Ability
			Total	Less Than 6 Mos.	6-11 Mos.	1-2 Yrs.	3-4 Yrs.	5-9 Yrs.	10+ Yrs.	
TOTAL	93.79	6.21	4.82	.58	.44	.75	.74	.78	1.54	1.38
$ 1 - 999	91.08	8.92	6.15	.66	.57	1.05	.91	1.01	1.95	2.77
$ 1000-1999	92.49	7.51	5.65	.68	.58	.92	.87	.89	1.71	1.86
$ 2000-2999	93.25	6.75	5.33	.66	.55	.86	.79	.83	1.64	1.42
$ 3000-3999	94.27	5.73	4.73	.60	.44	.68	.73	.77	1.52	1.00
$ 4000-4999	95.18	4.82	4.09	.53	.33	.58	.63	.70	1.32	.72
$ 5000-6999	95.81	4.19	3.62	.46	.27	.50	.60	.59	1.20	.57
$ 7000+	96.06	3.94	3.44	.41	.24	.46	.54	.55	1.23	.50
$ 7000-9999**	96.10	3.90	3.41	.40	.23	.47	.55	.56	1.21	.49
10,000-14,999**	95.66	4.34	3.79	.43	.27	.51	.59	.57	1.41	.55
15,000+**	94.57	5.43	4.57	.56	.28	.52	.81	.78	1.62	.87

*Calculated from: U.S. Dep't. of Commerce, Bureau of the Census, Persons with Work Disability: 1970 (Jan. 1973), Table 9. Presence and Duration of Work Disability for Persons 18 to 64 Years Old by Earnings in 1969, Type of Earnings, Race, Spanish Origin, Sex, and Age, 1970.

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